

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Parts 20, 32, and 150

#### National Source Tracking of Sealed Sources; Meeting

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of meeting.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) has published a proposed rule on National Source Tracking of Sealed Sources for public comment (70 FR 43646; July 28, 2005). The public comment period runs from July 28 thru October 11, 2005. As part of the public comment process, the NRC plans to hold two transcribed public meetings to solicit comments on the proposed rule. During the comment period, comments may also be mailed to the NRC or submitted via fax or e-mail. The meetings are open to the public and all interested parties may attend. The first meeting will be held at the NRC in Rockville, MD. The second meeting will be held at the offices of the Texas Department of State Health Services in Houston, TX.

**DATES:** August 29, 2005, from 9 a.m.—3 p.m. in Rockville, MD, and September 20, 2005, from 12:30 p.m. to 4:30 p.m. in Houston, TX.

**ADDRESSES:** The August 29 meeting will be held at the NRC Auditorium, Two White Flint North, 11545 Rockville Pike, Rockville, MD. The September 20 meeting will be held at the offices of the Texas Department of State Health Services—Elias Ramirez State Office Building, 5425 Polk Street, Rooms 4B–4E, Houston, Texas.

**FOR FURTHER INFORMATION CONTACT:** Merri Horn, telephone (301) 415–8126, e-mail, [mlh1@nrc.gov](mailto:mlh1@nrc.gov); Julie Ward, telephone (301) 415–5061, e-mail [jaw2@nrc.gov](mailto:jaw2@nrc.gov); or Ikeda King, telephone (301) 415–7278, e-mail [ijk@nrc.gov](mailto:ijk@nrc.gov) of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

**SUPPLEMENTARY INFORMATION:** The purpose of these meetings is to obtain stakeholder comments on the National Source Tracking Proposed Rule. The proposed rule would require licensees to report certain transactions involving certain sealed sources of concern to the National Source Tracking System. These transactions would include manufacture, transfer, receipt, or disposal of the nationally tracked source. The proposed rule would also require each licensee to provide its initial inventory of nationally tracked sources to the National Source Tracking System and annually verify and reconcile the information in the system with the licensee's actual inventory. In addition, the proposed rule would require manufacturers to assign a unique serial number to each nationally tracked source. The proposed rule is available on NRC's rulemaking Web site: <http://ruleforum.llnl.gov>.

**Agenda:** Welcome—10 minutes; NRC staff presentation on Rule Requirements—20 minutes; Public Comment—remainder. There will also be a poster board session on the transaction forms. To ensure that everyone who wishes has the chance to comment, we may impose a time limit on speakers.

Attendees are requested to notify Julie Ward, telephone (301) 415–5061, e-mail [jaw2@nrc.gov](mailto:jaw2@nrc.gov) or Ikeda King, telephone (301) 415–7278, e-mail [ijk@nrc.gov](mailto:ijk@nrc.gov) to preregister for the meetings. You will be able to register at the meetings, as well.

Dated at Rockville, Maryland, this 2nd day of August, 2005.

For the Nuclear Regulatory Commission.

**Charles L. Miller,**

*Director, Division of Industrial and Medical Nuclear Safety, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 05–15661 Filed 8–5–05; 8:45 am]

**BILLING CODE 7590–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 330

#### Deposit Insurance Coverage; Stored Value Cards and Other Nontraditional Access Mechanisms

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The FDIC is proposing to promulgate a regulation that would clarify the insurance coverage of funds subject to transfer or withdrawal through the use of stored value cards and other nontraditional access mechanisms. This proposed rule is a revision of a proposed rule published by the FDIC in April of 2004 (the “First Proposed Rule”). See 69 FR 20558 (April 16, 2004). The purpose of the revised proposed rule (the “Second Proposed Rule”) is to address certain issues raised by commenters in response to the original proposal. Through the Second Proposed Rule, the FDIC would add a new subsection to part 330 of title 12 of the Code of Federal Regulations. The new subsection would promote accuracy and consistency by insured depository institutions in reporting “deposits” for inclusion in an institution's assessment base. Also, the new subsection would provide guidance to the public about the insurance coverage of funds underlying nontraditional access mechanisms.

**DATES:** Written comments must be received by the FDIC no later than November 7, 2005.

**ADDRESSES:** Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web site: <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow the instructions for submitting comments.

- E-mail: [comments@fdic.gov](mailto:comments@fdic.gov). Include “Part 330—Stored Value Cards” in the subject line of the message.

- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

- Hand Delivery/Courier: Comments may be hand-delivered to the guard station located at the rear of the FDIC's 550 17th Street building (accessible from F Street) on business days between 7 a.m. and 5 p.m.

**Instructions:** All submissions must include the agency name and use the title “Part 330—Stored Value Cards.” All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html>, including any personal information

provided. Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW., Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

**FOR FURTHER INFORMATION CONTACT:**

Christopher L. Hencke, Counsel, Legal Division, (202) 898-8839, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:**

**I. The Statutory Definition of "Deposit"**

In the Federal Deposit Insurance Act ("FDI Act"), the term "deposit" is defined at section 3(l) (12 U.S.C. 1813(l)). This section includes several paragraphs. At paragraph 3(l)(1), the term "deposit" is defined in part as "the unpaid balance of money or its equivalent received or held by a bank or savings association in the usual course of business and for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by its certificate of deposit, thrift certificate, investment certificate, certificate of indebtedness, or other similar name \* \* \*." 12 U.S.C. 1813(l)(1).

At paragraph 3(l)(3), the term "deposit" is defined in part as "money received or held by a bank or savings association, or the credit given for money or its equivalent received or held by a bank or savings association, in the usual course of business for a special or specific purpose, regardless of the legal relationship thereby established, including without being limited to, escrow funds, funds held as security for an obligation due to the bank or savings association or others (including funds held as dealers reserves) or for securities loaned by the bank or savings association, funds deposited by a debtor to meet maturing obligations, funds deposited as advance payment on subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes \* \* \*." 12 U.S.C. 1813(l)(3).

Finally, paragraph 3(l)(5) provides that the FDIC, in consultation with the other federal banking agencies, may define "deposit" through regulation. See 12 U.S.C. 1813(l)(5). In accordance with paragraph 3(l)(5), the FDIC is consulting with the other agencies in connection with this proposed rulemaking.

**II. General Counsel's Opinion No. 8**

In 1996, the FDIC applied the statutory definition of "deposit" to

funds at insured depository institutions underlying stored value cards. The FDIC concluded that the funds in some stored value card systems are "deposits" but that the funds in other systems are not "deposits." The FDIC's interpretation was set forth in General Counsel's Opinion No. 8 ("GC8"). See 61 FR 40490 (August 2, 1996).

In GC8, the FDIC identified four types of stored value card systems that involve banks: (1) A "Bank Primary-Reserve System" (2) a "Bank Primary-Customer Account System"; (3) a "Bank Secondary-Advance System"; and (4) a "Bank Secondary-Pre-Acquisition System." Each of these systems is described below.

In a "Bank Primary-Reserve System," the insured depository institution issues stored value cards in exchange for cash from the cardholders. The depository institution does not maintain an individual account for each cardholder; rather, the institution maintains a pooled "reserve account" for all cardholders. In making payments to merchants or other payees (as the cardholders use their cards to purchase goods or services), the depository institution disburses funds from this "reserve account." In GC8, the FDIC determined that such funds held by the insured depository institution do not satisfy the statutory definition of "deposit" at section 3(l) of the FDI Act. In making this determination, the FDIC specifically addressed the applicability of paragraphs 3(l)(1) and 3(l)(3) (quoted above). First, in finding that the funds do not satisfy paragraph 3(l)(1), the FDIC found that the stored value cards are not structured so that the institution credits a conventional commercial, checking, savings, time or thrift account. Rather, the institution credits the pooled "reserve account." See 61 FR at 40492. Second, in finding that the funds do not satisfy paragraph 3(l)(3), the FDIC determined that the purpose of the funds is insufficiently "special or specific" because the cardholder might "engage in any of a number of unrelated transactions" with the result that the funds "could be associated with general or miscellaneous unrelated transactions." 61 FR at 40493. On the basis of this reasoning, the FDIC concluded that the funds in this type of system are not "deposits." See 61 FR at 40493, 40494.

A "Bank Primary-Customer Account System" is similar to a "Bank Primary-Reserve System" in that the insured depository institution issues stored value cards in exchange for cash from the cardholders. The two systems differ, however, in their accounting techniques. In a "Bank Primary-

Customer Account System," the depository institution does not maintain a pooled "reserve account" for all cardholders. Rather, the institution maintains an individual account for each cardholder. Citing paragraph 3(l)(1) of the statutory definition (quoted above), the FDIC in GC8 determined that the funds in these individual accounts are "deposits." See 61 FR at 40492, 40494.

In a "Bank Secondary-Advance System," the insured depository institution acts as an intermediary in collecting funds from cardholders in exchange for stored value cards issued by a third party or sponsoring company. The funds are held by the depository institution for a short period of time, then forwarded to the sponsoring company. See 61 FR at 40490. Later, when the cardholder uses the stored value card to make a purchase from a merchant, the sponsoring company (and not the depository institution) sends the appropriate amount of money to the merchant. In GC8, the FDIC determined that the funds collected by the depository institution are "deposits" belonging to the sponsoring company for the brief period before the funds are forwarded to the sponsoring company. The funds are not "deposits" belonging to the cardholders because the institution's liability for these funds is owed to the sponsoring company for whom the institution is temporarily holding the funds. See 61 FR at 40490-91, 40494.

Similarly, in a "Bank Secondary-Pre-Acquisition System," the insured depository institution provides cardholders with cards issued by a third party or sponsoring company. Prior to selling the cards to the cardholders, however, the depository institution purchases the cards from the sponsoring company. See 61 FR at 40490. In this respect, the system is different than a "Bank Secondary-Advance System." When the depository institution resells the cards to the cardholders, no money is owed to the sponsoring company. For this reason, the depository institution is free to retain the funds collected from the cardholders. Later, when a cardholder uses his/her stored value card to make a purchase from a merchant, the sponsoring company and not the depository institution sends the appropriate amount of funds to the merchant. In GC8, the FDIC determined that the funds collected by the depository institution in this system are not "deposits." See 61 FR at 40491, 40494. This conclusion was based upon the fact that the depository institution, in collecting funds from cardholders, does not assume a responsibility to

return or disburse the funds to the cardholders or the sponsoring company or any other party. Rather, the depository institution merely sells the right to collect funds from the sponsoring company (*i.e.*, the issuer of the cards). Thus, the funds underlying the stored value cards are held by the sponsoring company, not by the depository institution. Under these circumstances, no "deposits" exist at the depository institution. See 12 U.S.C. 1813(l)(1) (defining "deposit" as an "unpaid balance of money or its equivalent"); 12 U.S.C. 1813(l)(3) (providing that the term "deposit" does not include "funds which are received by the bank or savings association for immediate application to the reduction of an indebtedness to the receiving bank or savings association, or under condition that the receipt thereof immediately reduces or extinguishes such an indebtedness").

### III. The First Proposed Rule

Following the publication of GC8, the banking industry developed new types of stored value cards and stored value card systems. Indeed, stored value cards are one of the fastest growing products in the financial industry.

Certain types of cards are being marketed to lower-income consumers, especially the unbanked and the underbanked. The use of stored value cards can serve as a point of entry into the banking system for consumers without bank accounts, as well as provide asset-building and credit-building opportunities. Industry innovation in this area is of considerable interest to regulatory agencies and banks reaching out to underserved markets.

With more than 10 million unbanked households in the United States, prepaid debit products such as stored value cards or reloadable "payroll cards" are increasingly being used by employers to remit wages electronically to their employees. These cards have been used to provide consumers with a viable means of accessing funds and making financial transactions. Payroll cards have also served as an alternative to paying high fees at non-bank check cashers. Functioning as "checkless bank accounts," payroll debit cards have provided a convenient and safer way to store funds, pay for purchases, access automated teller machines ("ATMs") and pay bills. In addition, foreign remittance services are one of the ways in which banks use debit cards to build relationships with a large population of unbanked customers. The ability of banks to reach out to low- and moderate-income consumers with

products such as low-cost debit accounts, remittance services and individual development accounts may receive favorable consideration during Community Reinvestment Act examinations.

The evolving and increasing use of stored value cards is important to the banking industry. The FDIC and others in the banking industry recognize the importance of these cards to all consumers, including the underbanked. These cards provide banks with an opportunity to reach underserved markets.

While serving important needs, the development of new types of stored value cards has raised legal issues that the FDIC did not address in GC8. One of the new stored value card systems could be described as a "hybrid system" in that it combines the "Bank Primary-Reserve System" with the "Bank Primary-Customer Account System." In this hybrid system, the insured depository institution issues stored value cards against a pooled "reserve account" but also maintains individual accounts or subaccounts for the various cardholders. In some cases, the individual accounts or subaccounts are maintained by a processing agent. GC8 did not address such hybrid systems.

The banking industry also developed a system in which stored value cards are issued by a sponsoring company against an account at an insured depository institution. The issuance of cards by a sponsoring company (as opposed to a depository institution) is not a new development: the "Bank Secondary-Advance System" and the "Bank Secondary-Pre-Acquisition System" both involve the issuance of stored value cards by sponsoring companies. The new development (or at least the feature of "secondary systems" not discussed by the FDIC in GC8) is the funding of a bank account by the sponsoring company for the purpose of making payments on the stored value cards. When a cardholder uses his/her card to make a purchase from a merchant, the funds are disbursed to the merchant from this bank account. In GC8, the FDIC never addressed the question of whether the funds in such an account qualify as "deposits."

The "payroll card" is another type of card not specifically addressed in GC8. Such cards are distributed by employers to employees in lieu of paychecks. Prior to distributing the cards (or prior to activating the cards), the employer (directly or through a processing agent) places funds at a depository institution. After the distribution of the cards and the placement of the funds, the employees transfer or withdraw the

funds through the use of their cards. In some cases, payroll cards are reloadable.

GC8 also included no specific discussion of "gift cards." A person might buy a gift card from a retail store. In some cases, the gift card may be used to purchase goods or services wherever a major credit card may be used. Prior to the sales of such cards, the retail store (or some company under an agreement with the retail store) may place funds at a depository institution. After the sales of the cards and the placement of the funds, the cardholders transfer or withdraw the funds through the use of the cards.

In response to the development of these new types of stored value cards and stored value card systems, the FDIC published the First Proposed Rule. See 69 FR 20558 (April 16, 2004). The FDIC recognized the existence of three types of stored value card systems. First, the FDIC recognized systems in which an insured depository institution receives funds from cardholders, or receives funds from others on behalf of cardholders, in exchange for stored value cards issued by the depository institution. Under the First Proposed Rule, the funds held by the institution would be "deposits" unless (1) the institution records its liabilities for such funds in an account representing multiple cardholders; and (2) the institution (directly or through an agent) maintains no supplemental records or subaccounts reflecting the amount owed to each cardholder. Thus, in regard to "Bank Primary-Reserve Systems" and "Bank Primary-Customer Account Systems," the First Proposed Rule followed GC8. In addition, the First Proposed Rule provided that the funds in a hybrid system (not addressed in GC8) would be "deposits."

Second, the FDIC recognized systems in which an insured depository institution receives funds from cardholders in exchange for stored value cards issued by a sponsoring company (*e.g.*, a "Bank Secondary-Advance System" or a "Bank Secondary-Pre-Acquisition System"). Under the First Proposed Rule, the funds would be "deposits" if the depository institution bears an obligation to forward the funds to the sponsoring company or to hold the funds for the sponsoring company. After the forwarding or withdrawal of such funds, of course, the funds would cease to be "deposits." Also, the funds would never be "deposits" if the depository institution never bears an obligation to forward or hold the funds (*e.g.*, the depository institution purchases stored value cards from the sponsoring company and then resells the cards to the cardholders). In other

words, in regard to “Bank Secondary-Advance Systems” and “Bank Secondary-Pre-Acquisition Systems,” the First Proposed Rule simply followed GC8.

Third, the FDIC recognized systems in which funds are placed at an insured depository institution by a sponsoring company for the purpose of making payments on stored value cards issued by that company. As discussed above, this type of system was not addressed in GC8. Under the First Proposed Rule, the funds in such a system would be “deposits.”

The First Proposed Rule did not set forth specific rules for “payroll cards” or “gift cards.” Thus, under the First Proposed Rule, the funds underlying such cards would be subject to the general rules summarized above.

Finally, assuming that the funds in a particular system are “deposits,” the First Proposed Rule set forth no specific rules for determining whether the insured depositor is the cardholder as opposed to some other party (such as the employer in the case of payroll cards). Rather, the First Proposed Rule simply provided that the insurance coverage of the deposits would be governed by the same rules that apply to any other deposits. See 12 CFR part 330.

A separate issue is whether stored value cards should include mandatory disclosures as to whether the underlying funds are insured by the FDIC. In publishing the First Proposed Rule, the FDIC raised this issue but did not set forth any specific rules. Rather, the FDIC merely requested comments.

#### IV. The Comments

In response to the First Proposed Rule, the FDIC received 36 comments.<sup>1</sup> Approximately eight comments supported the proposed rule while approximately twenty comments opposed the rule. The other comments could be characterized as neutral.<sup>2</sup>

In supporting the First Proposed Rule, some commenters emphasized the importance of protecting consumers (*i.e.*, the persons who hold stored value cards). Others simply endorsed the proposed classification scheme (in which most funds held by banks would be “deposits” but some funds might not be “deposits”).

Those commenters who opposed the First Proposed Rule presented a variety

of objections. One of the objections was that the scope of the First Proposed Rule was too narrow. This particular objection is discussed in section A below. This objection warrants a separate discussion because the FDIC agrees that the scope of the proposed rule must be reconsidered. In section B, the commenters’ additional objections and arguments are discussed. These arguments include the following: (1) The proposed rule will trigger other laws and regulations; (2) the proposed rule is inconsistent with GC8; (3) cardholders do not expect to be insured; (4) the FDIC should recognize distinctions among types of stored value cards; (5) the funds underlying payroll cards should be insured but the funds underlying gift cards should not be insured; (6) adoption of the proposed rule will have a “chilling effect” on the development of stored value products; and (7) the adoption of a regulation is “premature.”

##### A. The Scope of the Proposed Rule

The stated purpose of the First Proposed Rule was “to clarify the meaning of ‘deposit’ as that term relates to funds at insured depository institutions underlying stored value cards.” The term “stored value card” was defined as “a device that enables the cardholder to transfer the underlying funds (*i.e.*, the funds received by the issuer of the card in exchange for the issuance or reloading of the card) to a merchant at the merchant’s point of sale terminal.” 69 FR at 20565–66. This stated purpose and this definition were based upon language in GC8. See 61 FR at 40490–91.

A number of commenters expressed the opinion that the proposed definition of “stored value card” is too narrow. They noted, for example, that some cards not only enable cardholders to transfer funds to merchants at point of sale terminals but also enable cardholders to make withdrawals at ATMs. Moreover, a device or mechanism that enables the user to make such transfers or withdrawals may not be a “card” at all. The mechanism could be a code or computer. Finally, some commenters noted that the term “stored value card” may be less common today than the term “prepaid card.”

*Response:* The FDIC agrees with these comments and is reconsidering the scope of the proposed rule.

Of course, no rule at all may be necessary if the funds underlying “stored value cards” or similar mechanisms do not differ in any material respects from the funds

underlying ordinary checks or ATM cards (*i.e.*, the funds in ordinary checking accounts). Although some of the literature suggests that stored value cards are different than checks because the funds are stored “on the card,” nothing is actually stored on the card except information (such as information about the amount available to the cardholder for transfers to merchants). In this respect, a stored value card is similar to a paper check. Both a card and a check serve as the means of transferring funds held at a bank. In both cases, the funds are delivered to merchants through a “clearing” process. This similarity was recognized in GC8. See 61 FR at 40490.

If a particular stored value card may be used to make withdrawals from ATM machines, then the card is similar to an ordinary ATM card. The use of a bank ATM machine to make withdrawals is a demonstration of the fact that the underlying funds are held at a bank, not “on the card.”

In short, stored value cards are very similar to traditional mechanisms for transferring or withdrawing funds from a bank. To the extent that the underlying funds have been placed at a bank, a self-described “stored value card” can serve as an access mechanism.<sup>3</sup> In this regard, a stored value card is no different than a check or bank-issued traveler’s check or money order. None of these mechanisms actually stores money. All of these mechanisms merely provide access to money stored at a bank.

Perhaps the major difference between stored value cards and traditional access mechanisms is that the holder of a stored value card, unlike the holder of a book of checks or the holder of an ATM card, need not deal directly with a bank. Rather, the holder of a stored

<sup>3</sup> To the extent that the card or other mechanism does not involve the placement of funds at a bank, the FDIC’s regulations are inapplicable. For example, the FDIC’s regulations do not apply to “closed systems” in which the cardholder deals directly with a merchant without the involvement of a bank. In such a system, the cardholder typically purchases his/her card directly from the merchant. The card enables the holder, at a later point in time, to collect goods or services from the same merchant. At that time, payment is not received by the merchant through a bank. On the contrary, the merchant has been prepaid through the sale of the card. Following the sale of the card, the merchant might place the funds into a deposit account at an FDIC-insured depository institution but any such placement of funds would have no effect on the “value” of the card or the cardholder’s ability to use the card to collect the promised goods or services. To the extent that the merchant places the funds into an account at an insured depository institution, the funds would be insurable to the merchant (not the cardholder) as the deposit of a corporation. See 12 CFR 330.11(a) (providing that the deposit accounts of a corporation are added together and insured up to \$100,000).

<sup>1</sup> Though a few of the comments were untimely, the FDIC has considered all of the comments in revising the proposed rule.

<sup>2</sup> Some comments represented multiple parties. For example, one comment represented 26 consumer groups. Comments from banking trade associations represented multiple banks.

value card may deal with either a bank or a third party.<sup>4</sup>

For example, in the case of payroll cards, the cardholders receive their cards from their employer (or agent company on behalf of the employer). The underlying funds are placed at a depository institution by the employer. After the distribution of the cards and the placement of the funds, the cards are used by the cardholders to transfer or withdraw the funds.

Similarly, in the case of gift cards, the cardholders may buy their cards from a retail store. Prior to selling the cards, the retail store (or some other company under an agreement with the retail store) may place the underlying funds at a depository institution. After the selling of the cards and the placement of the funds, the cards are used by the cardholders to transfer or withdraw the funds.

The fact that a depository institution holds the funds but might not deal directly with the cardholders creates the possibility that the institution will maintain no records as to the identities of the cardholders. In the event of the failure of the depository institution, the anonymity of the cardholders would create an obvious problem for the FDIC in attempting to pay deposit insurance to the cardholders. Concerns about the possible anonymity of cardholders played a large role in the FDIC's issuance of GC8 in 1996.

The problem of anonymity is not limited to persons with stored value cards. The same problem might exist in the case of persons who use other nontraditional means of transferring funds. For example, a company might provide customers with the service of purchasing goods or transferring funds over the Internet. In order to effectuate such transfers, the company might place funds at banks without providing the bank with information as to the identities of the customers. In such a scenario, an issue would exist as to whether the funds at the bank are "deposits" under paragraph 3(l)(1) of the statutory definition (as interpreted in GC8) because the funds would not be held in conventional checking or

savings accounts. In addition, an issue would exist as to whether the funds are "deposits" under paragraph 3(l)(3) of the statutory definition (as interpreted in GC8) because the funds might be used by the customers to make general and miscellaneous purchases over the Internet. Finally, assuming that the funds are "deposits," an issue would exist as to whether the funds should be insured to the company as opposed to the anonymous customers.

In short, the issues that exist with respect to the funds underlying stored value cards also exist with respect to the funds underlying other nontraditional access mechanisms. In order to resolve this broader set of issues, the FDIC has decided to replace the First Proposed Rule (dealing solely with funds underlying stored value cards) with the Second Proposed Rule (dealing with funds underlying all types of nontraditional access mechanisms). The Second Proposed Rule is explained in detail in section V, *infra*.

#### B. Other Objections

In response to the First Proposed Rule, commenters presented a number of objections that also might apply to the Second Proposed Rule. Each of the principal objections and arguments is discussed in turn below.

*The Effect Upon Other Laws.* Some commenters objected to the First Proposed Rule on the grounds that the adoption of a broad definition of "deposit" would trigger various laws and regulations that the commenters characterized as burdensome. Several commenters stated that the applicability of these laws and regulations could stifle development and increase costs of stored value products. The given examples of such laws and regulations included the Federal Reserve Act as implemented by Regulation D and the Electronic Fund Transfer Act as implemented by Regulation E. Commenters also cited Regulation P (privacy of consumer financial information), Regulation CC (availability of funds), Regulation DD (truth in savings), laws involving branches and mergers, the USA Patriot Act, and state laws involving escheat and liens.

*Response:* The laws and regulations cited by the commenters do not incorporate the definition of "deposit" in the FDI Act. Therefore, the FDIC's interpretation of "deposit" does not necessarily determine the applicability of these laws and regulations.

Regulation E is illustrative. This regulation provides certain protections to consumers who use electronic fund transfer services. See 12 CFR part 205. Nothing in Regulation E limits its

application to consumers with "deposits" as defined in the FDI Act. Rather, Regulation E protects consumers with "a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes." 12 CFR 205.2(b)(1) (emphasis added).

In September of 2004, the Board of Governors of the Federal Reserve System published a proposed rule that would provide that "payroll card accounts" are covered by Regulation E. See 69 FR 55996 (September 17, 2004). The proposed rule does not provide that Regulation E shall apply to all types of stored value card accounts or that Regulation E shall apply to all "deposits" as defined in the FDI Act. Thus, on its face, the proposed rule indicates that the applicability of Regulation E to consumers' accounts need not be coextensive with the insurance coverage of "deposits" as defined in the FDI Act.<sup>5</sup>

*Consistency With GC8.* Some commenters who opposed the First Proposed Rule presented legal arguments based on the statutory definition of "deposit" at 12 U.S.C. 1813(l). Most of these commenters objected to the FDIC's proposed treatment of funds in hybrid systems (*i.e.*, systems in which the depository institution maintains a pooled "reserve account" for all cardholders as in a "Bank Primary-Reserve System" but also maintains an account or subaccount for each cardholder as in a "Bank Primary-Customer Account System"). Under the First Proposed Rule, the funds in a hybrid system would be classified as "deposits."

In objecting to the FDIC's proposed treatment of funds in hybrid systems, the commenters relied in large part upon the FDIC's analysis of "Bank Primary-Reserve Systems" in GC8. As previously discussed, the FDIC in GC8 found that the funds in such systems do not qualify as "deposits" under either paragraph 3(l)(1) or paragraph 3(l)(3) of the statutory definition (previously quoted). First, the FDIC found that the funds do not qualify as "deposits" under paragraph 3(l)(1) because the funds are not credited to conventional commercial, checking, savings, time or thrift accounts. Rather, the funds are credited to a pooled self-described

<sup>4</sup> Even this difference may be overstated. While the purchaser of a stored value card might not deal directly with a bank, the purchaser of a traditional money order also might not deal directly with a bank. Rather, the purchaser might deal with an express company or money transmitter. If the money transmitter places funds into a bank, the funds will be "deposits" of the money-transmitting company and not "deposits" of the purchasers. See, *e.g.*, FDIC Advisory Opinion No. 91-21 (March 21, 1991). Under the Second Proposed Rule, funds underlying stored value cards would be treated in a similar fashion (*i.e.*, the funds placed in a bank would be "deposits" but not necessarily "deposits" of the purchasers).

<sup>5</sup> The applicability of Regulation E or other regulations administered by the Board of Governors lies within the jurisdiction of the Board of Governors, not within the jurisdiction of the FDIC.

“reserve account.” See 61 FR 40490. Second, the FDIC found that the funds do not qualify as “deposits” under paragraph 3(l)(3) because the purpose of the funds is insufficiently “special or specific.” In reaching this conclusion, the FDIC noted that the funds might be disbursed to any number of merchants as the cardholders use their cards in miscellaneous and unrelated transactions. See *id.*

On the basis of the same reasoning, some commenters argued that the funds in a hybrid system are not “deposits.” First, these commenters noted that the funds in a hybrid system are not credited to conventional commercial, checking, savings, time or thrift accounts (as those terms are interpreted in GC8). Rather, the funds are credited to the pooled “reserve account” and the individual stored value card subaccounts. Second, these commenters noted that the funds in the “reserve account” and the subaccounts are not “special or specific” in purpose (as that term is interpreted in GC8) because the funds might be disbursed to any number of merchants as the cardholders use their cards in miscellaneous and unrelated transactions. These commenters therefore argued that under the FDIC’s own interpretation in GC8 of paragraphs 3(l)(1) and 3(l)(3), the funds should not be “deposits.”

*Response:* The commenters’ interpretation as summarized above is not the only possible interpretation of GC8 as to whether the funds in hybrid systems are “deposits.” As explained in the preamble to the First Proposed Rule, the issue simply was not resolved in GC8. See 69 FR 20558, 20562 (April 16, 2004).

The confusion regarding the applicability of GC8 is an important reason for replacing GC8 with a regulation. In the end, the question is not whether certain funds are “deposits” under GC8 but whether certain funds are “deposits” under the statute and regulations implementing and interpreting the statute. In publishing the First Proposed Rule, the FDIC attempted to clarify the meaning of the statute. In regard to funds in hybrid systems, the FDIC concluded that such funds are “deposits” under paragraph 3(l)(3) of the statutory definition because the funds in each subaccount are held for the “special or specific purpose” of satisfying the bank’s obligations to a specific customer, *i.e.*, the individual cardholder.<sup>6</sup> See 69 FR at 20562. This

conclusion is consistent with GC8, in which the FDIC found that the funds in a “Bank Primary-Customer Account System” are “deposits.” No apparent difference exists between the funds in an individual subaccount and the funds in an individual account.

In summary, the FDIC continues to believe that the funds in hybrid systems are “deposits.” The FDIC is not persuaded by the comments to the contrary. Moreover, even if the funds in a particular type of system (such as a hybrid system) are not “deposits” under paragraph 3(l)(1) or paragraph 3(l)(3), the FDIC may classify the funds as “deposits” under paragraph 3(l)(5) (subject to the FDIC’s consultations with the other federal banking agencies). In light of the similarity between debit cards or ATM cards (providing access to traditional bank accounts) and stored value cards in a hybrid system (providing access to bank subaccounts), the FDIC believes that the funds in a hybrid system should be classified as “deposits.”

*Cardholders’ Expectations.* Another argument advanced by some commenters is that the funds underlying certain types of stored value cards—especially gift cards—should not be classified as “deposits” because the cardholders do not perceive themselves as depositors.

*Response:* Whether cardholders expect their cards to be supported by insured deposits is a significant practical issue (discussed further below), but it is not determinative. First, the issue for the FDIC is not simply whether the funds underlying gift cards are “deposits.” Assuming that the funds are “deposits,” an additional issue is whether the insurance coverage protects the cardholders as opposed to some other party. For example, the funds underlying certain gift cards might be placed at an insured depository institution by a retail store. Assuming that the retail store retains control of the funds, or the store fails to satisfy the FDIC’s requirements for obtaining “pass-through” insurance coverage, the FDIC would treat the store and not the cardholder as the depositor. Thus, the cardholders’ alleged perceptions and expectations would be fulfilled (they would not be treated as depositors) and yet the funds held by the bank could be classified as “deposits” (insurable not to the cardholders but to the retail store).

Second, the commenters’ argument does not address the fact that some cardholders receive periodic statements or balances from the depository

institution (or such statements or balances are made available by the depository institution). The FDIC is concerned that a stored value cardholder who receives a statement or balance from an FDIC-insured depository institution would expect his or her funds to be protected by the FDIC. In other words, the cardholders may perceive themselves as depositors.

Third, the statutory definitions of “deposit” and “insured deposit” are very broad. They do not make reference to customers’ perceptions and expectations. See 12 U.S.C. 1813(l); 12 U.S.C. 1813(m). In light of the foregoing, the FDIC is reluctant to adopt a regulation that would rely on customers’ alleged perceptions and expectations.

*Distinctions Among Types of Cards.* In response to the First Proposed Rule, some commenters argued that the FDIC should base deposit insurance determinations on certain characteristics of stored value cards. For example, one commenter stated that the underlying funds should be treated as “deposits” only in the case of “funds on cards that are the functional equivalent of a deposit in terms of longevity, purpose, usability, and ownership.” This commenter further argued that the funds should not be treated as “deposits” in the case of “funds on cards that are the functional equivalent of a payment mechanism more akin to cash.”

*Response:* Two points must be emphasized. First, under the FDI Act, insurance of “deposits” is not limited to funds owned by bank customers with formal or long-term relationships with the bank. For example, the term “deposit” includes funds underlying bank-issued travelers’ checks, official checks and money orders. See 12 U.S.C. 1813(l)(1); 1813(l)(4). Even though the payee of such an instrument may have established no formal relationship with the bank, the FDIC will provide insurance to the payee (in the event of the bank’s failure) because the funds held by the bank are “deposits.”

Second, a stored value card is not “akin to cash.” Rather, a stored value card is more closely related to payment instruments such as checks or travelers’ checks or money orders because the card must be backed-up by money at a bank. As previously explained, this money moves to merchants through a “clearing” process. In contrast, no “clearing” takes place in the case of cash.

*Payroll Cards Versus Gift Cards.* Some commenters argued that the FDIC should expressly differentiate between payroll cards and gift cards. These commenters suggested that the FDIC

<sup>6</sup> The FDIC also stated that the funds in individual subaccounts might be “deposits” under

paragraph 3(l)(1) of the statutory definition. See 12 69 FR at 20562.

should adopt a rule that provides as follows: (1) the funds underlying payroll cards are “deposits”; but (2) the funds underlying gift cards are not “deposits.”

*Response:* Although the FDIC has not incorporated this suggestion in the Second Proposed Rule, additional comments are requested as to whether the FDIC should recognize a distinction between the funds underlying payroll cards and the funds underlying gift cards. In the case of gift cards, the insurance of the underlying funds may depend on whether the funds are held in an account solely in the name of the retail store (*i.e.*, the party that places the funds into the bank) as opposed to being held in a custodial account that satisfies the FDIC’s requirements for “pass-through” insurance coverage (*i.e.*, coverage that “passes through” the retail store to the cardholders). If the gift cards have been issued by the bank itself and not issued by or through a retail store or other sponsoring company, one possibility might be to create a “*de minimis*” rule. For example, the FDIC could create a rule providing that the funds underlying cards with small balances (*e.g.*, up to \$100) are not “deposits.” Assuming that the gift cards have been issued directly by the bank (and not by or through a retail store or sponsoring company or any other party), another possibility might be to create a rule under which the funds underlying gift cards are not “deposits” if the insured depository institution maintains no records as to the identities of the cardholders or any other parties. Such an exception to the definition of “deposit” was included in the First Proposed Rule. Although the Second Proposed Rule does not include such exceptions to the definition of “deposit,” comments are requested.

In the case of funds underlying payroll cards, one possibility is to create a rule mandating satisfaction of the FDIC’s “pass-through” requirements so that the funds always would be insured to the employees. For example, the FDIC might forbid insured depository institutions from accepting funds underlying payroll cards unless (1) the employer (or agent company on behalf of the employer) maintains records reflecting the identities of the employees and the amount payable to each employee; and (2) the employer relinquishes ownership of the funds to the employees so that the employer cannot recover the funds under any circumstances (*e.g.*, upon the expiration of a card). Although the Second Proposed Rule does not include such a provision, comments are requested. The purpose of such a provision would be to protect the wages and salaries of

employees. Assuming that the FDIC adopts such a provision, comments are requested as to whether this type of provision should apply only to payroll cards or whether the FDIC should extend this treatment to other cards such as those used to deliver welfare or medical benefits.

The manner in which an employer uses payroll cards may be affected by state labor laws and regulations. Most notably, it appears that at least some state labor laws, though perhaps written to address a different issue, would effectively require employers to satisfy “pass-through” requirements. Comments are requested as to the applicability of any such state laws, with particular focus on whether they effectively insure that employees will receive “pass-through” coverage in the absence of FDIC rules requiring satisfaction of “pass-through” requirements.

*“Chilling Effect.”* Some commenters argued that the adoption of a broad definition of “deposit” would have a “chilling effect” on the development of stored value products. This argument is based upon the proposition that the definition of “deposit” under the FDI Act is a trigger with respect to the operation of other laws and regulations (such as Regulation E or the USA Patriot Act).

*Response:* As previously explained, a determination by the FDIC that certain funds held by a bank are insurable as “deposits” under the FDI Act would not automatically trigger application of various other laws and regulations. Conversely, a determination by the FDIC that the funds underlying some, or all, classes of stored value cards are not “deposits” would not preclude application of these other laws and regulations.

*“Premature.”* Some commenters argued that the adoption of a rule is “premature.” These commenters urged the FDIC—together with the other banking agencies—to conduct a study of stored value products.

*Response:* The timeliness of this rulemaking must be viewed in light of the fact that the FDIC has not addressed many of the issues relating to stored value cards since 1996 (when GC8 was published). Since that time, the development of new types of stored value products and systems (such as hybrid systems) has created uncertainty as to the insurance coverage of the underlying funds. If the FDIC fails to provide guidance, the holders of access mechanisms will not know whether they are insured. Moreover, insured depository institutions will not know whether to report the funds as

“deposits” in Call Reports. Under these circumstances, the FDIC believes that rulemaking may be necessary now.

## V. The Second Proposed Rule

The FDIC has considered the comments submitted by the public in response to the First Proposed Rule. These comments have increased the FDIC’s understanding of the issues relating to stored value cards and other nontraditional access mechanisms.

As discussed in the preceding section, the funds underlying some nontraditional access mechanisms are placed at an insured depository institution by a party other than the holder of the mechanism. For example, in the case of payroll cards, the funds will be placed at the insured depository institution by the employer (or agent company on behalf of the employer) while the cards will be held by employees.<sup>7</sup> Similarly, in the case of gift cards, the funds may be placed at the insured depository institution by a retail store (or other company pursuant to an agreement with the retail store) while the cards may be held by customers of the retail store. These arrangements create the possibility that the insured depository institution will possess no records as to the identities of the holders of the access mechanisms. An absence of such records appears especially likely in the case of low-denomination, transferable gift cards. In the event of the failure of the insured depository institution, the anonymity of the holders of the access mechanisms would create an obvious problem for the FDIC in attempting to pay deposit insurance.

The issue described above is not addressed in section 3(l) of the FDI Act (defining “deposit”). The issue is addressed in section 12(c), which provides that the FDIC—in paying deposit insurance—is entitled to rely on the account records of the insured depository institution in identifying the owners of deposits. See 12 U.S.C. 1822(c).<sup>8</sup>

In accordance with section 12(c), the FDIC has promulgated certain rules regarding the identification of the owners of deposits. These rules are set forth in section 330.5 of the insurance regulations. See 12 CFR 330.5. Section

<sup>7</sup> Of course, the same arrangement exists in the case of direct deposits: the funds are placed at the bank by the employer for the benefit of the employees. In the case of direct deposits, the funds are placed into accounts maintained by (and in the name of) the various employees.

<sup>8</sup> Determining the owner of a deposit is different than determining the existence of a deposit. Section 12(c) is applicable in determining the owner of a deposit, but is inapplicable in determining the existence of a deposit.



330.5 provides that “the FDIC shall presume that deposited funds are actually owned in the manner indicated on the deposit account records of the insured depository institution.” 12 CFR 330.5(a)(1). If the party that places funds at an insured depository institution is not the actual owner of the funds but a mere agent or custodian, then certain disclosure requirements must be satisfied in order for the insurance coverage to “pass through” the agent to the actual owner(s). See 12 CFR 330.5(b); 12 CFR 330.7. First, the agency or custodial relationship must be disclosed in the account records of the insured depository institution. See 12 CFR 330.5(b)(1). Second, the interests of the actual owners must be disclosed in records of the insured depository institution or records maintained by the custodian or other party. See 12 CFR 330.5(b)(2). If the disclosure requirements are not satisfied, the funds will be insured to the custodian (*i.e.*, the party that places the funds at the insured depository institution).

The FDIC is proposing to add a new paragraph to section 330.5. This new paragraph would extend the FDIC’s rules regarding ownership of deposits to funds underlying nontraditional access mechanisms, including cards, codes, computers or other electronic means. This approach differs from the approach taken by the FDIC in the First Proposed Rule, which would have added a new section to 12 CFR part 303.

The Second Proposed Rule would be codified at 12 CFR 330.5(c). This new paragraph would include three subsections, which are summarized below.

Subsection 330.5(c)(1) would recognize that the term “deposit” includes “funds subject to transfer or withdrawal solely through the use of nontraditional access mechanisms, including cards, codes, computers or other electronic means, to the extent that such mechanisms provide access to funds received and held by an insured depository institution for payment to others.” This subsection also would state that the FDIC, in determining the owners of funds underlying such nontraditional access mechanisms, would apply the general disclosure rules in section 330.5 as well as the special rules set forth in subsections 330.5(c)(2) and 330.5(c)(3) (summarized below). To the extent that a stored value card does not provide access to funds at a bank (such as subway farecard), the FDIC’s regulations would be inapplicable. See *FDIC v. Philadelphia Gear Corporation*, 476 U.S. 426 (1986).

Subsection 330.5(c)(2) would address cases in which funds are placed at an

insured depository institution by one party for transfer or withdrawal by the same party. In such a case, no issue would exist as to whether the funds should be insured to the party that places the funds at the bank as opposed to the party holding the access mechanism. The parties would be the same person. Accordingly, the funds would be insured to that person. An example of funds covered by this subsection would be funds transferable by the customer through the Internet (as opposed to the funds in an ordinary checking account, which would be governed by the ordinary disclosure rules in section 330.5).

Subsection 330.5(c)(3) would address cases in which funds are placed at an insured depository institution by one party for transfer or withdrawal by other parties. An example would be the funds underlying payroll cards, in which the funds are placed at the bank by the employer but the funds are subject to transfer or withdrawal by the employees. Another example would be the funds underlying gift cards, in which the funds may be placed at the bank by a retail store (or other company under an agreement with the retail store) but the funds are subject to transfer or withdrawal by customers of the retail store. Under this subsection, the funds would be insured to the first party (*i.e.*, the party that places the funds at the bank<sup>9</sup>) unless (A) the account records of the insured depository institution reflect the fact that the first party is not the owner of the funds; and (B) either the first party or the depository institution (or an agent on behalf of the first party or the depository institution) maintains records reflecting the identities of the persons holding the access mechanisms and the amount payable to each such person. If both of these conditions are satisfied, then the funds would be insurable to the persons holding the access mechanisms.<sup>10</sup>

Under subsection 330.5(c)(3), the involvement of a third-party processor for the bank would not preclude “pass-through” insurance coverage. As stated

<sup>9</sup> If the party that places the funds at the bank is merely an agent for some other party, then the funds would be insurable to the principal in accordance with the FDIC’s ordinary rules for accounts held by agents or custodians. See 12 CFR 330.7(a); 12 CFR 330.5(b).

<sup>10</sup> Of course, the deposits cannot be insured to the persons holding the access mechanisms unless such persons are the actual owners. See 12 CFR 330.3(h); 12 CFR 330.5(a)(1). Thus, the party placing the funds at the bank must relinquish ownership. For example, in the case of payroll cards, the employer should surrender all rights to recover the funds. If the employer does not relinquish ownership, the employer will be treated as the insured depositor.

above, “pass-through” coverage to the holders of the stored value cards or other access mechanisms would be available under both of the following circumstances: (1) the depository institution itself maintains records reflecting the identities of the cardholders and the amount payable to each cardholder; or (2) a third-party processor on behalf of the depository institution maintains records reflecting the identities of the cardholders and the amount payable to each cardholder. In the latter case, the depository institution’s own records (*i.e.*, the records not maintained by the third-party processor) should reflect the fact that the funds are not owned by the party that placed the funds into the bank (*e.g.*, the employer in the case of payroll cards or the retail store in the case of gift cards) but instead are owned by the cardholders.

Unlike the First Proposed Rule, the Second Proposed Rule does not address the following scenario: (1) The stored value cards or other nontraditional access mechanisms are sold or issued directly by the insured depository institution to the public (and not issued by or through a third party or sponsoring company); and (2) the depository institution maintains no accounts or subaccounts or other records reflecting the identities of the purchasers. The First Proposed Rule provided that the funds held by the depository institution, in this scenario, would not be “deposits.” The FDIC has not addressed this scenario in the Second Proposed Rule, however, because the FDIC is unsure that such a scenario actually exists. Comments are requested on this point. The FDIC is interested in learning whether any insured depository institution is selling stored value products directly to the public without maintaining any records as to the identities of any parties.

Assuming the existence of such a system, payment of insurance by the FDIC would be difficult in the event of the failure of the insured depository institution. In light of this difficulty, comments are requested as to whether the funds in any such system should be classified as “deposits.”

Arguably, the form of the access mechanism is unimportant. Whether the mechanism is traditional (such as an ATM card, book of checks or official check) or nontraditional (such as a stored value card), the access mechanism is merely a device for withdrawing or transferring the underlying money. The important thing is the underlying money. The receipt of money by the bank distinguishes a “deposit” liability from a “non-deposit”



liability. In the case of a “non-deposit” liability, the bank generally does not receive money from the creditor but instead receives goods or services.

The appropriate model for the FDIC’s treatment of funds underlying stored value cards and other nontraditional access mechanisms may be the FDIC’s treatment of funds underlying traditional access mechanisms. In the case of traditional access mechanisms and payment instruments (such as checks, traveler’s checks, cashier’s checks and money orders), the underlying funds held at a bank are “deposits” with no exceptions except those limited exceptions expressly created by Congress (such as the exception for bank obligations payable solely outside the United States). See 12 U.S.C. 1813(l)(1); 12 U.S.C. 1813(l)(4); 12 U.S.C. 1813(l)(5). This means that the funds are “deposits” irrespective of whether the bank maintains records as to the identities of customers and irrespective of account labels (such as “reserve account”).

The FDIC could extend this simple approach to funds underlying nontraditional access mechanisms. Of course, the results would be somewhat different than the results under GC8 (or the First Proposed Rule) but the FDIC is not bound to incorporate GC8 in the proposed rule.

In short, the question is whether the FDIC should adopt a regulation that treats the funds underlying stored value cards and other nontraditional access mechanisms as “deposits” provided that the funds have been placed at an insured depository institution. This approach would be consistent with the FDIC’s treatment of funds underlying traditional access mechanisms. An alternative approach would be to treat the funds as “non-deposits” in those cases (if any) in which the insured depository institution sells stored value cards directly to cardholders without keeping any information as to the identities of the cardholders or any other party. This approach would be different than the FDIC’s treatment of funds underlying traditional access mechanisms. Comments are requested.

Finally, some discussion may be warranted regarding a type of stored value card system addressed in the First Proposed Rule but not addressed in the Second Proposed Rule. This type of system was characterized in GC8 as a “secondary system” (*i.e.*, the “Bank Secondary-Advance System” or the “Bank Secondary-Pre-Acquisition System”). In this type of system, the insured depository institution collects funds from cardholders but does not hold the funds for the cardholders.

Rather, the depository institution either forwards the funds to a sponsoring company or retains the funds as reimbursement for funds previously paid to the sponsoring company. In either case, the depository institution plays no role in the payment process. When the cardholders use their cards, funds are transferred or withdrawn from the sponsoring company and not transferred or withdrawn from the insured depository institution.

Since the publication of GC8 in 1996, the FDIC has received few if any inquiries about “secondary systems.” The FDIC is unsure whether any such systems currently exist. Under these circumstances, no reason may exist for addressing such systems in the Second Proposed Rule. Comments are requested. Assuming the existence of such systems, the FDIC could add a subsection providing that the funds received by the insured depository institution are “deposits” belonging to the sponsoring company for the brief period before the funds are forwarded to the sponsoring company (consistent with GC8’s treatment of funds in a “Bank Secondary-Advance System”). This subsection also could provide that no “deposits” would exist if no obligation exists on the part of the depository institution to hold or forward any funds (consistent with GC8’s treatment of funds in a “Bank Secondary-Pre-Acquisition System”). Assuming the existence of “secondary systems,” comments are requested as to whether the FDIC should add such provisions to the Second Proposed Rule.

## VII. Disclosures

The First Proposed Rule did not mandate that stored value cards disclose whether the underlying funds are insured by the FDIC. In publishing the First Proposed Rule, however, the FDIC discussed this question. See 69 FR 20558, 20564 (April 16, 2004). The FDIC stated that it “expects insured depository institutions to clearly and conspicuously disclose to customers the insured or non-insured status of the stored-value cards they offer to the public.” The Office of the Comptroller of the Currency (OCC) has informed the institutions under its supervision that it has the same expectation when they implement payroll card systems. See OCC Advisory Letter 2004–6 (May 6, 2004).

In response to the First Proposed Rule, a number of commenters addressed the issue of disclosures. Some commenters supported mandatory disclosures, but several commenters expressed the opinion that mandatory disclosures are unnecessary.

The FDIC recognizes that mandatory disclosures would impose a degree of burden on depository institutions. On the other hand, this burden may be outweighed by consumers’ need for accurate information. While not mandating specific disclosures in the Second Proposed Rule, the FDIC is interested in receiving comments on this subject.

One option is to require specific disclosures when “pass-through” coverage is available to cardholders or when the depository institution has a good faith belief that the FDIC’s requirements for “pass-through” coverage have been satisfied. In such a case, the following could be printed on the card:

“Funds available through this card are individually insured by the FDIC to the Cardholder.”

Such a disclosure would not be mandated when “pass-through” coverage is unavailable to cardholders. Indeed, when “pass-through” coverage is unavailable, any statement about FDIC insurance coverage (such as a statement to the effect that the funds underlying a particular gift card are insured to the retail store that sold the card, not to the cardholder) could be very confusing. For this reason, the FDIC seeks comments on how to prevent misleading disclosures and whether certain disclosure practices should be prohibited.

Another question is whether a brief disclosure should be printed on the stored value card itself or whether a more substantive disclosure that clearly explains the scope of federal insurance coverage should be provided at the time that the card is issued. Possibly, the card could refer the consumer to a source of additional information about the insured status of the consumer’s funds. An additional question is whether the name of the depository institution that holds the underlying funds should be printed on the card.

Comments are requested on each of these questions. The FDIC is interested in determining the feasibility of providing disclosures to consumers and the usefulness of any such disclosures to consumers.

### *Request for Comments*

The FDIC seeks comments on all aspects of the Second Proposed Rule.

### *Paperwork Reduction Act*

The FDIC is seeking comments on whether to mandate disclosures to the holders of stored value cards (as discussed in section VII). Requiring the disclosure of information to the public

may qualify as a "collection of information" for purposes of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). See 5 CFR 1320.3(c). The required disclosure would not be a "collection of information," however, to the extent that the FDIC is providing specific language that insured depository institutions may use in disclosing information to the public. See 5 CFR 1320.3(c)(2). Moreover, insured depository institutions already must ascertain the information in question—whether funds underlying stored value cards qualify as "deposits"—in completing their Call Reports. Thus, nothing in this proposed rulemaking requires an insured depository institution to collect information that the institution otherwise would not collect.

In summary, no collections of information pursuant to the Paperwork Reduction Act are contained in the proposed rule. Accordingly, no information has been submitted to the Office of Management and Budget (OMB) for review. If the proposed rule is revised in response to the public comments, the FDIC will make another determination as to the applicability of the Paperwork Reduction Act and seek OMB approval as appropriate.

#### *Regulatory Flexibility Act*

In accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a)), the FDIC must publish an initial regulatory flexibility analysis with this proposed rulemaking or certify that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of "small entities" (*i.e.*, depository institutions with total assets of \$150 million or less). On the basis of the reasons set forth below, the FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

*Economic Impact.* The proposed rulemaking is not intended to apply to any issue except the meaning of "deposit" under the FDI Act. The definition of "deposit" is applied consistently to all insured depository institutions, including "small" institutions with assets under \$150 million. As of March 31, 2005, there were 5,322 "small" FDIC-insured institutions. Though this rulemaking may affect the manner in which some insured depository institutions report "deposits" in their Call Reports, the rulemaking generally will not impose new obligations on insured depository institutions because such institutions—

irrespective of this rulemaking—must file Call Reports.

Notwithstanding the above, the FDIC may be imposing new obligations on insured depository institutions in directing such institutions—when issuing stored value cards—to make clear and conspicuous disclosures as to whether the underlying funds are insured (as discussed in section VII). The FDIC believes that clear, conspicuous disclosures are necessary in order to prevent confusion on the part of the public. See 12 U.S.C. 1819 (investing the FDIC with general rulemaking authority with respect to deposit insurance). In any event, the FDIC believes that the cost of adding clear and conspicuous disclosures to stored value cards will not result in a significant economic impact on a substantial number of small entities. This conclusion is based upon the fact that the cost will involve the design of a depository institution's stored value cards, not the production of such cards. Adding a one-sentence disclosure to a card should involve at most only a minimal cost. Indeed, the addition of a clear and conspicuous disclosure about insurance coverage may reduce the institution's costs in answering questions from the public about FDIC insurance coverage.

Although the proposed rulemaking should not create a significant adverse economic impact on an insured depository institution, and may even result in a modest net benefit, the FDIC believes that insured depository institutions should be given an opportunity to provide comments on the subject. Accordingly, comments are requested (below).

The FDIC is not aware of any federal rules that would duplicate, overlap or conflict with a requirement that stored value cards issued by insured depository institutions must include clear and conspicuous disclosures about insurance coverage.

*Request for Comments.* The FDIC requests comments as to the cost of adding a clear and conspicuous disclosure about insurance coverage to stored value cards by insured depository institutions. Commenters may wish to address the following: (1) The number of small entities that are issuing stored value cards or may issue stored value cards; (2) the manner and impact of adding a clear and conspicuous disclosure about insurance coverage to stored value cards; and (3) alternative methods of preventing confusion on the part of the public.

#### *Impact on Families*

The proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

#### **List of Subjects in 12 CFR Part 330**

Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings and loan associations, Trusts and trustees.

For the reasons set forth in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 330 of Title 12 of the Code of Federal Regulations as follows:

#### **PART 330—DEPOSIT INSURANCE COVERAGE**

1. The authority citation for part 330 continues to read as follows:

**Authority:** 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818(q), 1819(Tenth), 1820(f), 1821(a), 1822(c).

2. Section 330.5 is amended by adding a new paragraph (c) to read as follows:

#### **§ 330.5 Recognition of Deposit Ownership and Fiduciary Relationships**

\* \* \* \* \*

(c) *Nontraditional access mechanisms*—(1) Purpose. This paragraph shall apply to funds subject to transfer or withdrawal solely through the use of nontraditional access mechanisms, including cards, codes, computers or other electronic means, to the extent that such mechanisms provide access to funds received and held by an insured depository institution for payment to others. In determining the owners of such deposits, the FDIC shall apply the general rules in this section as well as the special rules in this paragraph (c).

(2) Funds received by an insured depository institution from one party for transfer or withdrawal by the same party. In the case of funds placed at an insured depository institution by one party for transfer or withdrawal by the same party, the funds shall be deposits belonging to that party. (*Example:* A bank allows customers to open accounts over the Internet. The funds placed at the bank by a customer are not transferable by check; however, the customer may transfer funds to merchants through the Internet. Until such transfers to merchants, the funds held by the bank are deposits insurable to the customer.)

(3) Funds received by an insured depository institution from one party for transfer or withdrawal by other parties. In the case of funds placed at an insured depository institution by one party for transfer or withdrawal by other parties, the funds shall be deposits insurable to the first party (*i.e.*, the party that places the funds) unless the account records of the insured depository institution reflect the fact that the first party is not the owner of the funds; and either the first party or the depository institution (or an agent on behalf of the first party or the depository institution) maintains records reflecting the identities of the persons holding the access devices and the amount payable to each such person. If both of these conditions are satisfied, then the funds may be insured to the persons holding the access devices. (*Example 1:* A retail store sells gift cards to customers. Prior to the sales of these cards, the retail store places funds at an insured depository institution. The funds are transferable or withdrawable by the holders of the gift cards. In the event of the expiration of a card, however, the funds are not recoverable by the cardholders. In fact, no information about the identities of the cardholders is maintained by the depository institution or the retail store. Under these circumstances, the funds held by the depository institution are deposits insurable to the retail store. *Example 2:* An employer distributes payroll cards to employees. Prior to the distribution of the cards, the employer places funds at an insured depository institution. The funds are transferable or withdrawable by the employees through the use of the payroll cards. An account or subaccount is established at the depository institution for each cardholder. The funds in each such account or subaccount cannot be recovered by the employer. Under these circumstances, the funds are deposits insurable to the employees.)

Dated at Washington, DC this 19th day of July, 2005.

By Order of the Board of Directors of the Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 05-15568 Filed 8-5-05; 8:45 am]

**BILLING CODE 6714-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2005-22034; Directorate Identifier 2004-NM-182-AD]

RIN 2120-AA64

#### Airworthiness Directives; Gulfstream Model GV and GV-SP Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Gulfstream Model GV and certain Model GV-SP series airplanes. This proposed AD would require a one-time inspection of the left and right aileron and elevator actuators to determine the part and serial numbers of each actuator, repetitive inspections of suspect actuators to detect broken damper shafts, and replacement of any actuator having a broken damper shaft. This proposed AD would also require that operators report any broken damper shaft they find to the FAA. This proposed AD also would provide an optional terminating action for the repetitive inspection requirements of this proposed AD. This proposed AD is prompted by reports of broken or cracked damper shafts within the aileron and elevator actuator assemblies. We are proposing this AD to detect and correct broken damper shafts, which could result in locking of an aileron or elevator actuator (hard-over condition), which would activate the hard-over protection system (HOPS), resulting in increased pilot workload and consequent reduced controllability of the airplane.

**DATES:** We must receive comments on this proposed AD by September 22, 2005.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

- *DOT Docket Web site:* Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- *Government-wide Rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL-401, Washington, DC 20590.

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

- *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, Georgia 31402-9980.

You can examine the contents of this AD docket on the Internet at <http://dms.dot.gov>, or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL-401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA-2005-22034; the directorate identifier for this docket is 2004-NM-182-AD.

**FOR FURTHER INFORMATION CONTACT:** Gerald Avella, Aerospace Engineer, Systems and Equipment Branch, ACE-119A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703-6066; fax (770) 703-6097.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA-2005-22034; Directorate Identifier 2004-NM-182-AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you can visit <http://dms.dot.gov>.

##### Examining the Docket

You can examine the AD docket on the Internet at <http://dms.dot.gov>, or in