



# Department of the Treasury Financial Crimes Enforcement Network

**FIN-2013-R002**

**Issued: November 13, 2013**

**Subject: Whether a Company that Offers a Payment Mechanism  
Based on Payable-Through Drafts to its Commercial  
Customers is a Money Transmitter**

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Dear [ ]:

This responds to your letter of October 22, 2007, seeking an administrative ruling from the Financial Crimes Enforcement Network (“FinCEN”) on whether your client, [ ] (the “Company”), is a money services business (“MSB”) under the regulations implementing the Bank Secrecy Act (“BSA”). Specifically, you ask whether a payment mechanism based on payable-through drafts that the Company offers to its commercial customers (the “customers”) makes the Company a money transmitter under the regulations.

As described in your letter, the Company offers its customers a payment mechanism based on payable-through drafts (the “Product”), which allows customers to make payments of goods or services, or to obtain cash, from merchants that have signed up with the Company to accept the Product (“participating merchants”). A customer that wishes to use the Product must open an account at the Company, which will be funded with the customer’s own funds or with credit extended by the Company to the customer; the account can be only accessed through paper drafts that are drawn on the Company and cleared through the regular banking system. Before the draft can be used either for purchasing goods or services, or cashed at a participating merchant, the Company must authorize it, that is, provide the participating merchant with a code number that confirms that the customer (a) has authorized the draft up to the amount of the purchase or the cash advance; and (b) has enough funds available in its account to cover the draft. The actual paper drafts can be either pre-printed without denomination and then distributed to either the customer or the participating merchant, or generated at the participating merchant’s site through point of sale (“POS”) terminals provided by the Company. The participating merchant deposits the authorized draft into its bank account, the draft is cleared through the regular banking system, the draft amount is debited from the Company’s account at its clearing bank, and the Company in turn debits the account of its customer.

On July 21, 2011, FinCEN published a Final Rule amending definitions and other regulations relating to MSBs (the “Rule”).<sup>1</sup> The amended regulations define an MSB as “a person wherever located doing business, whether or not on a regular basis or as an organized business concern, wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (ff)(1) through (ff)(6) of this section. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States.”<sup>2</sup> Under this definition, however, a money services business shall not include certain persons, such as a bank or foreign bank, a person registered with, and regulated or examined by, the Securities and Exchange Commission (“SEC”) or the Commodity Futures Trading Commission (“CFTC”), or a foreign financial agency that engages in financial activities that, if conducted in the United States, would require the foreign financial agency to be registered with the SEC or CFTC.

BSA regulations, as amended, define the term “money transmitter” to include a person that provides money transmission services, or any other person engaged in the transfer of funds. The term “money transmission services” means the acceptance of currency, funds, or other value that substitutes for currency from one person *and* the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.<sup>3</sup> The regulations stipulate that whether a person is a money transmitter is a matter of facts and circumstances, and enumerate business models where a person’s activities would not make such person a money transmitter; they also state that, in general terms, a person is not a money transmitter to the extent that the person “accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.”<sup>4</sup>

The Product offered by the Company is based on accepting funds from its customers, storing such funds in an account the customer maintains at the Company, and transmitting such funds to participating merchants according to the customer’s instructions. FinCEN concludes that the Company is engaging in money transmission, must register with FinCEN as a money transmitter, and is subject to the recordkeeping and reporting requirements applicable to money transmitters under the BSA.

You have made the argument that the Company is not a money transmitter based on past FinCEN rulings. Specifically, you base such argument on rulings in which FinCEN has concluded that entities were not MSBs due to particular facts and circumstances involving the offer of certain debt management services,<sup>5</sup> and the

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<sup>1</sup> 76 FR 43585 (July 21, 2011) Bank Secrecy Act Regulations – Definitions and Other Regulations Relating to Money Services Businesses.

<sup>2</sup> 31 CFR § 1010.100(ff).

<sup>3</sup> 31 CFR § 1010.100(ff)(5)(i)(A) and (B).

<sup>4</sup> 31 CFR § 1010.100(ff)(5)(ii).

<sup>5</sup> FinCEN Ruling 2004-4, “Definition of Money Services Business (Debt Management Company),” November 24, 2004.

provision of services as a merchant payment processor.<sup>6</sup> FinCEN finds that these past rulings are inapplicable to the present situation for the reasons stated below.

You have stated that the Company is not an MSB because, to the extent that it accepts and transmits funds in connection to its Product, those payments are “integral parts of the execution and settlement of transactions other than the funds transmissions themselves.” In FinCEN Ruling 2004-4, FinCEN identified the money transmission that a debt management business conducts as an example of such “integral” funds transmissions. To the extent that the money transmission conducted by the debt management business is limited to submitting payments to creditors on behalf of debtors in conjunction with a debt management plan, the debt management business is not a money transmitter by virtue of such activities. FinCEN’s conclusion was based on the fact that the debt management company was instrumental in negotiating a payment plan that adjusted the total amount of debt, was binding on both the creditor and the debtor, and required the participation of the debt management company as payment processor. In the Company’s case, however, the draft-based money transmission offered by the Company under the Product is not integral to the execution and settlement of any transaction other than the funds transmission itself. FinCEN has a series of interpretations deeming an entity a “money transmitter” based on this approach.<sup>7</sup>

As stated above, FinCEN regulations stipulate that whether a person is a money transmitter is a matter of facts and circumstances, and they exempt certain activities from the definition of “money transmitter.”<sup>8</sup> Within the context of payment processing, FinCEN regulations expressly exclude from the definition of “money transmitter” a person that only “[a]cts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller.”<sup>9</sup> Specifically, the regulations clarify four necessary elements of the more generalized payment processor exemption, i.e., that: (1) the entity actually facilitates the purchase of goods or services, or payment of bills for goods or services; (2) the entity operates through a clearance and settlement system; (3) the entity operates pursuant to a formal agreement; and (4) the entity’s agreement is at a minimum with the seller or creditor that is receiving the funds.

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<sup>6</sup> FinCEN Ruling 2003-8, “Definition of Money Services Business (Merchant Payment Processor),” November 19, 2003.

<sup>7</sup> See FIN-2008-R007 (Whether a Certain Operation Protecting On-line Personal Financial Information is a Money Transmitter - 06/11/2008). See also FIN-2008-R004 (Whether a Foreign Exchange Consultant is a Currency Dealer or Exchanger or Money Transmitter - 05/09/2008); FIN-2008-R003 (Whether a Person That is Engaged in the Business of Foreign Exchange Risk Management is a Currency Dealer or Exchanger or Money Transmitter - 05/09/2008); FIN-2008-R002 (Whether a Foreign Exchange Dealer is a Currency Dealer or Exchanger or Money Transmitter - 05/09/2008). For an example of a ruling when the same basic business model, applied to two types of customers, would justify a different regulatory interpretation, see FIN-2009-R004 (Determination of Money Services Business Status and Obligations Under the Funds Transfer Recordkeeping Rule, and Request for Regulatory Relief - 01/19/2010).

<sup>8</sup> 31 CFR § 1010.100(ff)(5)(ii).

<sup>9</sup> 31 CFR § 1010.100(ff)(5)(ii)(B).

The three administrative rulings on which the payment processor exemption is based all involved arrangements through a clearance and settlement system intermediating solely between BSA regulated institutions (specifically, the ACH system). This circumstance was a significant factor in FinCEN's ultimate decision in these rulings. While not limited to any specific clearance system, the intent and regulatory context of the previous rulings' make clear that for the exemption to apply the entity must use a "clearance and settlement system" that intermediates "solely between BSA regulated institutions."<sup>10</sup> Examples of such systems include "the Fedwire system, electronic funds transfer networks, certain registered clearing agencies regulated by the Securities and Exchange Commission ... and derivative clearing organizations, or other clearinghouse arrangements established by a financial agency or institution."<sup>11</sup>

With respect to an entity's agreement with the seller or creditor receiving the funds, it is important also to understand the extent of such agreement. For the exemption to apply, the payment processor must be acting on behalf of a seller or creditor (i.e., with a person to whom money was owed either to complete a transaction, or because of a previously incurred debt) to obtain payment from the buyer or debtor.<sup>12</sup> The agreement should provide for the transmission of funds only to the creditor or seller with whom the payment processor is contracting and not to another location or person.<sup>13</sup>

This ruling is provided in accordance with the procedures set forth at 31 CFR § 1010.711. In arriving at the conclusions in this administrative ruling, we have relied upon the accuracy and completeness of the representations you made in your communications with us. Nothing precludes FinCEN from arriving at a different conclusion or from taking other action should circumstances change or should any of the information you have provided prove inaccurate or incomplete. We reserve the right, after redacting your name and address and the Company's name, to publish this letter as guidance to financial institutions in accordance with our regulations for requesting an administrative ruling.<sup>14</sup> You have fourteen days from the date of this letter to identify any other information you believe should be redacted and the legal basis for redaction.

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<sup>10</sup> 31 CFR §1010.100(ff)(5)(ii)(C).

<sup>11</sup> *Id.*

<sup>12</sup> An agreement with a buyer or debtor (i.e., with a person who owes money) by itself is not sufficient to satisfy this element of the exemption. In addition to, or as part of, such an agreement with the buyer or debtor, the existence of an agreement with the seller or creditor is necessary for the exemption to apply. *See* FIN-2008-R010, "Whether a Company that Engages in Certain Operations as an Authorized Agent for Collection of Social Security and Veteran Benefits is a Money Services Business", December 11, 2008) (company determined not to be a money transmitter had agreement in place with government agencies as a payment agent, but also had in place agreements with customers electing to receive benefits through the company).

<sup>13</sup> *See* 74 FR 22138 (May 12, 2009).

<sup>14</sup> 31 CFR §§ 1010.711-717.

If you have questions about this ruling, please contact FinCEN's regulatory helpline at (703) 905-3591.

Sincerely,

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Jamal El-Hindi  
Associate Director  
Policy Division