



**Department of the Treasury
Financial Crimes Enforcement Network**

FIN-2014-R004

Issued: April 29, 2014

Subject: Application of Money Services Business Regulations to a Company that Offers Escrow Services to a Buyer and Seller in a Given Internet Sale of Goods or Services

Dear []:

This responds to your letter of October 25, 2013, seeking an administrative ruling from the Financial Crimes Enforcement Network (“FinCEN”) on behalf of [] (the “Company”), about the Company’s status as a money services business (“MSB”) under the Bank Secrecy Act (“BSA”). Specifically, you ask whether the escrow services that the Company offers to the buyer and the seller in a given internet sale of goods or services would require the Company to register with FinCEN as a money transmitter. Based on the following analysis with respect to facts presented in your letter, FinCEN does not deem the Company to be a money transmitter pursuant to our regulations.

You state that the Company provides escrow services to individuals and businesses. Pursuant to instructions provided by the parties to an internet transaction, the Company receives funds from the buyer and holds the funds in escrow until releasing the funds to the seller, subject to the satisfaction of specified conditions precedent. The funds that the Company receives are kept in an account at a depository institution that is segregated from the account the Company utilizes to cover the cost of operations. To use the escrow services, both parties must register online with the Company and propose the terms of the transaction, including product to be purchased, purchase price, length of the buyer’s inspection period, party responsible for paying the escrow fees, shipping method, and shipping fees (the “Transaction Terms”).

If both parties agree to the Transaction Terms, the Company will instruct the buyer to send funds to the Company to be held in escrow. Upon verifying receipt of funds from the buyer, the Company will instruct the seller to deliver the product to the buyer and submit delivery tracking information, if applicable. After receiving the product, the buyer has the right to inspect it for the duration of the inspection period. If the buyer accepts the product, the Company will release the funds from escrow and pay the seller. If the buyer rejects the product, the buyer must return it to the seller; upon confirmation by the seller that the product has been returned, the Company returns the funds (minus escrow fees) to the buyer.

On July 21, 2011, FinCEN published a Final Rule amending definitions and other regulations relating to MSBs (the “Rule”).¹ The Rule defines 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.” Doing business within the United States includes, but is not limited to, the maintenance of any agent, agency, branch, or office within the United States.²

The Rule defines the term “money transmitter” to include a person that “provides money transmission services, or any other person engaged in the transfer of funds.”³ 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.⁴ The Rule also stipulates that whether a person is a money transmitter is a matter of facts and circumstances, and identifies six sets of circumstances under which a person’s acceptance and transmission of currency, funds or other value that substitutes for currency would not make such person a money transmitter. Of particular relevance to the Company is the fact that, generally, the acceptance and transmission of funds “only integral to the sale of goods or the provision of services, other than money transmission services,” will not cause the person that is accepting and transmitting the funds to be deemed a money transmitter.⁵

This limitation on the definition of “money transmission services” derives from a similar limitation in the FinCEN regulations on MSBs that preceded the Rule. FinCEN interpreted this similar limitation in a number of rulings which, while not directly applicable to the Rule, still give a good indication of FinCEN’s understanding of the term “integral.” In FinCEN Ruling 2004-4, FinCEN identified the money transmission that a debt management business conducted as an example of “integral” funds transmissions under the then-applicable regulation.⁶ 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. FinCEN concluded that, to the extent that the money transmission conducted by the debt management business was limited to submitting payments to creditors on behalf of debtors in conjunction with such a debt management plan, the debt management business was not a money transmitter by virtue of such activities. Similarly, in FinCEN Ruling FIN-2008-R011, FinCEN determined that a

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

² 31 CFR § 1010.100(ff).

³ 31 CFR § 1010.100(ff)(5)(i)(A) and (B).

⁴ 31 CFR § 1010.100(ff)(5)(i)(A).

⁵ 31 CFR § 1010.100(ff)(5)(ii)(F).

⁶ FinCEN Ruling 2004-4, “Definition of Money Services Business (Debt Management Company),” November 24, 2004.

company that facilitated “micro-lending” between lenders and entrepreneurs (“borrowers”) in the developing world was not a money transmitter. The company acted as a clearinghouse between its micro-finance lending partners and borrowers, and established the terms of participation in the clearinghouse required of both lenders and borrowers. FinCEN concluded that the company’s acceptance and transmission of the lender’s funds was an integral part of the loan clearinghouse services it offered.⁷ In FinCEN Ruling FIN-2008-R007, by contrast, FinCEN reached the opposite conclusion with respect to a company that accepted and transmitted funds in a confidential manner in order to protect a consumer's personal and financial information from a merchant when the consumer purchased goods or services. This company, unlike the debt management company or the micro-lending clearinghouse, accepted any consumer and any merchant willing to use its confidential process, and played no active part in arranging, monitoring, verifying or endorsing the transactions that it processed. As a result, FinCEN concluded that this company did not provide a service independent of money transmission, notwithstanding its claim that it provided the service of security, but instead merely offered a secure method of money transmission.⁸

This background should provide useful context for FinCEN’s conclusions with respect to the Company. FinCEN finds that the Company’s money transmission activities are only necessary and integral to its provision of escrow services. In order to provide assurances to both buyer and seller that the buyer has enough resources to pay for the goods and services, on the one hand, and that those resources will not be released until the transaction is completed according to the purchase agreement, on the other, the Company needs to take possession of the funds and hold them in escrow until the pre-established conditions for the funds to be paid to the seller or returned to the buyer are met, then release those funds appropriately. The acceptance and transmission of funds do not constitute a separate and discrete service provided in addition to the underlying service of transaction management. They are a necessary and integral part of the service itself. Therefore, the Company would not be a money transmitter as that term is defined in our regulations.

This ruling is provided in accordance with the procedures set forth at 31 CFR Part1010 Subpart G. 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 similar identifying information for your clients, to publish this letter as guidance to financial institutions in accordance with our

⁷ FIN-2008-R011, “Whether a Company that Engages in Microfinance is a Money Services Business,” February 20, 2009.

⁸ FIN-2008-R007, “Whether a Certain Operation Protecting On-Line Personal Financial Information is a Money Transmitter,” May 27, 2008.

regulations.⁹ 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.

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

Sincerely,

//signed//

Jamal El-Hindi
Associate Director
Policy Division

⁹ 31 CFR §§ 1010.711-717.

