



## Department of the Treasury Financial Crimes Enforcement Network

**FIN-2014-R006**

**Issued: April 29, 2014**

**Subject: Whether a Company that Provides Online Real-Time Deposit, Settlement, and Payment Services for Banks, Businesses and Consumers is a Money Transmitter rather than a Provider of Prepaid Access.**

Dear [ ]:

This responds to your letter dated August 21, 2012 on behalf of [ ] (the “Company”) to the Financial Crimes Enforcement Network (“FinCEN”), in which you seek an administrative ruling on the application of money services business (“MSB”) regulations as they relate to the activities of the Company as a financial services company that provides online real-time deposit, settlement, and payment services for banks, businesses and consumers. We note that you acknowledge that the Company is an MSB and has registered with FinCEN identifying itself as a money transmitter. You seek confirmation, however, that the Company falls under our MSB definition at 31 CFR §1010.100 as a “money transmitter” rather than a “provider of prepaid access.” Based on the following analysis with respect to the facts presented in your letter, FinCEN confirms that the Company is a money transmitter, and not a provider of prepaid access.

You state that the Company operates a payments platform that enables consumers and businesses to send and receive online payments. The platform is intended for business use and is typically used for real estate transactions, auction items, and other significant commercial purchases. It can also be used by buyers to pay sellers directly, thus replacing the need for a traditional “escrow account.” Both the buyer and seller must open an account and, as part of the account opening procedures, the Company performs risk-based customer due diligence. A buyer can fund an account with Automated Clearing House (“ACH”) transactions, credit and debit card transactions, checks, or wire transfers.

In anticipation of a transaction, the buyer will transfer funds to its account, and then the seller is notified there is a transaction ready for completion. If the seller agrees to the transaction, a request for payment is sent and the buyer releases the funds. Similar to a security deposit, sellers also have an option to place a hold on funds as part of a transaction. Settlements occur in real-time within the Company’s core processing system. After a transaction has settled, the seller may maintain the funds in its account or withdraw the funds by ACH, wire transfer or requesting a check. Buyers also can maintain or withdraw the unused funds in their accounts. You also state that the Company does not issue any credit, debit or prepaid cards and that the funds can only be transferred to one designated seller and not split among multiple sellers.

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The term MSB refers to certain financial services providers, wherever located, that do business wholly or in a substantial part in the United States in each of the following distinct categories: (1) dealer in foreign exchange; (2) check casher; (3) issuer or seller of traveler's checks or money orders; (4) provider of prepaid access; (5) money transmitter; (6) the United States Postal Service; and (7) seller of prepaid access.<sup>1</sup>

Prepaid access is defined as “access to funds or the value of funds that have been paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, electronic serial number, mobile identification number, or personal identification number.”<sup>2</sup> A provider of prepaid access is defined as “the participant within a prepaid program that agrees to serve as the principal conduit for access to information from its fellow program participants[.]” The participants in a prepaid program must designate one of the prepaid program participants to serve as the provider of prepaid access.<sup>3</sup> Where no participant registers as the provider of prepaid access for a defined prepaid program, “the provider of prepaid access is the person with principal oversight and control over the prepaid program.”<sup>4</sup>

A money transmitter is defined as 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>5</sup> The regulations also stipulate that whether a person is a money transmitter is a matter of facts and circumstances, and they identify particular sets of circumstances under which a person is not a money transmitter.<sup>6</sup>

#### Application of Prepaid Access Rules to the Company's Activities

Although prepaid access is similar to the activity in which “money transmitters” engage, the procedures for directing that funds be transmitted are different, and because of these differences FinCEN treats providers and sellers of prepaid access as distinct MSB categories.<sup>7</sup> A person engaged in the transactions you have described would not be considered a provider of prepaid access because the essential elements of a prepaid program are not present, i.e., an arrangement of one or more persons acting together to provide prepaid access, defined as “access to funds or the value of funds that have been

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<sup>1</sup> 31 CFR § 1010.100(ff)(1)-(7).

<sup>2</sup> See 31 CFR § 1010.100(ww).

<sup>3</sup> See 31 CFR § 1010.100(ff)(4).

<sup>4</sup> *Id.*

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

<sup>6</sup> See 31 CFR § 1010.100(ff)(5)(ii).

<sup>7</sup> See 75 FR 36593 (June 28, 2010).

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paid in advance and can be retrieved or transferred at some point in the future through an electronic device or vehicle, such as a card, code, ...”<sup>8</sup>

Your letter explains that the Company’s program facilitates payment between two unique parties, a designated buyer and seller. While the Company’s operating model requires the potential buyer to place funds “on account,” for future application to a purchase transaction, those funds are *only* applicable to this particular seller for this particular transaction. This contrasts markedly from most transactions involving prepaid access,<sup>9</sup> wherein the prepaid access operates more like a fungible payment instrument in traditional commerce, usable at any number of as-yet-unidentified merchants.

We also note that the Company’s business transactions do not involve an “electronic device or vehicle,” nor does the Company’s transaction system necessarily employ the use of a corresponding electronic network in processing the payment.<sup>10</sup> As your letter further states, BIN<sup>11</sup> numbers are a required component of the MSB registration process for Providers of Prepaid Access, and there are no BIN numbers associated with the Company’s transactions. From your description, it appears that the Company’s transactions could be completed via a bookkeeping or notational entry. Consequently, FinCEN deems the transactions you have described do not fall within the definition of provider of prepaid access.

#### Application of Money Transmission Rules to the Company’s Activities

On July 21, 2011, FinCEN published a Final Rule amending definitions and other regulations relating to MSBs (the “Rule”).<sup>12</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.” Doing business within the United States would include, but is not limited to, the maintenance of any agent, agency, branch, or office within the United States.<sup>13</sup>

FinCEN’s regulations, as amended, define the term “money transmitter” to include a person that “provides money transmission services, or any other person

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<sup>8</sup> 31 CFR 1010.100(ww).

<sup>9</sup> This analysis is limited to open-loop prepaid access. We do not consider the Company’s activities to be at all analogous to closed-loop prepaid access, which focuses on retail consumer transactions, rather than the commercial business transactions that are the focus of the Company’s business model.

<sup>10</sup> Your letter indicates that the actual settling of the payment transaction may be effected as requested by the seller, via ACH, wire or check.

<sup>11</sup> Bank Identification Number.

<sup>12</sup> Bank Secrecy Act Regulations – Definitions and Other Regulations Relating to Money Services Businesses, 76 FR 43585 (July 21, 2011).

<sup>13</sup> 31 CFR § 1010.100(ff).

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engaged in the transfer of funds.”<sup>14</sup> 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>15</sup>

To reiterate, you state that the Company operates a payments platform that enables consumers and businesses to send and receive online payments. The originator directs some of these payments without making them conditional to the recipient complying with any predetermined obligation, and the Company holds some until the intended recipient completes its side of the transaction.

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 prevent the person that is accepting and transmitting the funds from being deemed to be a money transmitter.<sup>16</sup> In FinCEN Ruling 2004-4, FinCEN identified the money transmission that a debt management business conducts as an example of such “integral” funds transmissions under the applicable regulation.<sup>17</sup> 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 under the circumstances described in that Ruling, the debt management business is not a money transmitter by virtue of such activities. In that Ruling, 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.

See, also, FinCEN Ruling FIN-2008-R011, in which FinCEN determined a company that facilitates “micro-lending” between lenders and entrepreneurs (“borrowers”) in the developing world was not a money transmitter. By acting as a clearinghouse between its micro-finance lending partners and borrowers, and having its micro-financing lending partners, operating locally, pre-qualify the borrowers and then upload their profiles directly to the company’s web site, the company’s acceptance and transmission of the lender’s funds is an integral part of the execution and settlement of the micro-lending.<sup>18</sup>

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<sup>14</sup> 31 CFR § 1010.100(ff)(5)(i)(A) and (B).

<sup>15</sup> The regulations also stipulate that whether a person is a money transmitter is a matter of facts and circumstances, and enumerates business models in which a person’s activities would not make such person a money transmitter. *See* 31 CFR § 1010.100(ff)(5)(ii).

<sup>16</sup> 31 CFR § 1010.100(ff)(5)(ii)(F).

<sup>17</sup> FinCEN Ruling 2004-4, “Definition of Money Services Business (Debt Management Company),” November 24, 2004.

<sup>18</sup> FIN-2008-R011, “Whether a Company that Engages in Microfinance is a Money Services Business,” February 20, 2009.

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Based on the description in your letter, FinCEN understands that the Company accepts currency, funds, or other value that substitutes for currency from one person *and* transmits currency, funds, or other value that substitutes for currency to another location or person. The Company's service also consists of receiving funds from a buyer and holding them, until the buyer instructs the Company to transmit the funds to a seller. Although you make reference to the fact that the service offers an alternative to "traditional payment transactions that would normally require the use of an 'escrow account'," you do not assert that the Company provides traditional escrow services. The Company is not providing any verification or validation procedure that compares the terms and conditions of the sale with the actual discharge of the obligations of the parties or that would protect the interests of both the buyer and the seller.<sup>19</sup> From your description, we conclude that the Company's payment and transmission services are not necessary, or integral, to any other service other than money transmission itself. Consequently, FinCEN deems the full scope of the Company's transactions you have described as a money transmission service and agrees that the Company should remain registered as an MSB in this capacity.

This ruling is provided in accordance with the procedures set forth at 31 CFR Part 1010 Subpart G. In arriving at the conclusions in this letter, we have relied upon the accuracy and completeness of the representations made in your letter. Nothing precludes us from reaching a different conclusion or taking further action if circumstances change or any of the information provided is inaccurate or incomplete. We reserve the right, after redacting your name and your company's name and address, to publish this letter as guidance to financial institutions in accordance with our regulations. 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>19</sup> In certain circumstances, FinCEN has found that money transmission activities are a necessary and integral part of entities providing escrow services. In order to offer assurance 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 escrow agent needs to take possession of the funds and hold them in escrow until the prior conditions are met for the funds to be paid to the seller or returned to the buyer. In this case, the transmission of funds is not a separate and discrete service provided in addition to and independently from the underlying transaction, but a necessary and integral part of the transaction itself. Therefore, an escrow agent would not be a money transmitter as that term is defined in our regulations, only if it acts as an independent arbiter of whether the terms and conditions of the transaction have been satisfactorily completed by both parties. Such services may include: (a) instructing the seller to deliver the product to the buyer and submit delivery tracking information, if applicable, only after verifying receipt of sufficient funds from the buyer; (b) holding the buyer to the previously agreed inspection period, if applicable; (c) releasing the funds from escrow and paying the seller only after the buyer's acceptance of the product; and (d) if the buyer rejects the product, returning funds to the buyer after confirmation from the seller that the returned product has been received

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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